STATE OF MICHIGAN

COURT OF APPEALS

BRIAN SCOTT KZESKI, Plaintiff-Appellee,	UNPUBLISHED March 25, 2014
v	No. 315529 Eaton Circuit Court Family Division
CLAIRE LOUISE KZESKI, Defendant-Appellant.	LC No. 11-000246-DM

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment of divorce entered by the family division of the circuit court insofar as it granted plaintiff legal and physical custody of the parties' children and held defendant's parenting time in abeyance until further order of the court. For the reasons stated below, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties married on May 1, 1993 and had two daughters; one born in 1995 and the other in 1997.[1] Although plaintiff stayed at home for three years when the children were young, it was undisputed that defendant was the primary caretaker of the children before the parties separated in 2011. The evidence consistently showed that defendant initially had a good relationship with the children, but that the relationship deteriorated, and that by the time the parties separated, plaintiff and the children were alleging that defendant was physically and verbally abusive to them.

Events seemed to come to a head in February 2011. A Child Protective Services investigator testified that she received two complaints regarding defendant's parenting, and that for each the preponderance of the evidence supported allegations of improper supervision, including threatened harm to the children. Defendant was placed on the Central Child Abuse

[1] The parties agree that this case now concerns only their younger daughter, the older one's having reached the age of majority.

Registry, and plaintiff was advised to remove himself and the children from the situation. Plaintiff and the children resorted to a safe house provided by Siren, the Eaton County domestic violence shelter.

There was also a domestic disturbance at the home on February 12, 2011, that led to involvement of the police. Although defendant described plaintiff as being abusive and "psychotic" on that occasion, when the police arrived they encouraged plaintiff to take the children away so that defendant could stay home and rest. Plaintiff testified that he felt obliged to protect the children from defendant's ranting and raving, and was concerned for the children. Plaintiff acted on the advice of the police and obtained a personal protection order against defendant.

In February 2011 plaintiff commenced a divorce action and filed an ex parte motion for custody of the children. The trial court granted plaintiff sole legal and physical custody, and referred the parties to the Friend of the Court for a determination of child support and parenting time. Defendant then objected to the ex parte order and asked the court to order psychological evaluations. The trial court responded with an interim order holding defendant's parenting time in abeyance until further order of the court, and directing the parties and the children to submit to psychological evaluations.

A referee hearing on parenting time and child support followed, in which the parties stipulated to the admission a psychological report regarding defendant, which apparently concluded that defendant's mental health was a significant factor and that her condition had worsened considerably in recent years. The court also heard testimony from a psychiatrist who had treated defendant twice, who opined that defendant had no mental health issues beyond normal anxiety. However, the psychiatrist never saw defendant with the children, and was unable to form an opinion about defendant's ability to relate to her family members. A social worker who met with defendant on a semi-regular basis testified to concerns about defendant's health and anxiety levels as a result of not having any contact with the children. The social worker testified that it was clear that defendant loved the children, and that she would trust defendant with parenting time. However, the social worker had met the children only in passing, and admitted that she knew only one side of the story.

The hearing referee recommended that plaintiff have sole physical custody, that the parties share legal custody, that defendant's parenting time remain suspended, and that the parties participate in family reunification counseling.

In response to defendant's objections, the trial court conducted a hearing de novo.

The court took testimony from, among others, the parties and a reunification counselor. The court also interviewed the parties' younger daughter in chambers. Admitted into evidence was a letter from a hospital, which indicated that it was having problems treating both defendant and the younger daughter (who has a chronic liver disease), finding it necessary to keep appointments separate, confine those patients to separate entrances, and involve internal security. The letter also reported that the police had to be involved on more than one occasion and that the problems had led some of the staff to question whether the hospital should continue to treat the younger daughter. The reunification counselor testified that she had decided against seeing the

children jointly with defendant because defendant did not believe she had done anything wrong and appeared to feel that all the problems between them were caused by others. The counselor further opined that defendant would use therapy as a platform to vent her own issues instead of an opportunity to explore them, and reported that when she approached the children about contact with defendant they started "twitching" in their seats and "looked absolutely horrified." The counselor additionally opined that any reunification efforts should be initiated by the children.

II. DUE PROCESS

After considering the best-interest factors under MCL 722.23, the trial court found that there was clear and convincing evidence that parenting time with defendant would endanger the children's physical, mental, and emotional health, and so continued to hold her parenting time in abeyance. Defendant argues that by suspending her parenting time "indefinitely" for three and a half years, the court effectively terminated her parental rights without affording her the attendant due process rights. We disagree.

Claims that a party was deprived due process are reviewed de novo on appeal. *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). Proceedings to terminate parental rights are governed by Chapter XIIA[2] of the Probate Code,[3] and subchapter 3.900 of the Court Rules. Child custody decisions, including those regarding parenting time, are governed by the Child Custody Act.[4]

When parental rights are terminated, "the terminated parent loses any entitlement to the custody, control, services and earnings of the minor." *In re Beck*, 488 Mich 6, 15; 793 NW2d 562 (2010). In contrast, a "child-custody determination" includes "a permanent, temporary, initial, and *modification* order." MCL 722.1102(c) (emphasis added). Further, "for the best interests of the child the court may . . . [m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . " MCL 722.27(1)(c); see also *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010). Accordingly, the court's decision to suspend defendant's parental rights was not the equivalent of the court's effectively terminating her parental rights. Defendant was thus not entitled to notice that her parental rights were in jeopardy.

Defendant also challenges as inadequate the notice she received in connection with an April, 2013 hearing, but does not explain what was inadequate about it, beyond pointing to her own objection below predicated on notice. Her actual reason for objecting was that she did not have time to secure a certain witness, any prejudice or other disadvantage attendant to which the trial court obviated by accepting as truth her offer of proof concerning how the witness would

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[2] MCL 712A.1 *et seq.*

[3] MCL 710.21 *et seq.*

[4] MCL 722.21 *et seq*.

have testified. Accordingly, defendant failed to show that she suffered any disadvantage from any notice deficiency.

We therefore reject defendant's due process challenges.

III. BEST INTERESTS

Defendant argues that the trial court erred finding that suspension of defendant's parenting time was in the children's best interests. Again, we disagree.

> "Orders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." Under the great weight of the evidence standard, this Court should not substitute its judgment on questions of fact unless the facts clearly preponderate in the opposite direction. In child custody cases, an abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. Clear legal error occurs when the trial court errs in its choice, interpretation, or application of the existing law. [*Shade*, 291 Mich App at 21; 805 NW2d 1 (2010) (internal quotation marks and citations omitted.]

MCL 722.27a(1) provides as follows:

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

However, "[a] child has a right to parenting time with a parent *unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health*." MCL 722.27a(3) (emphasis added). In determining the best interests of a child for purposes of a custody determination, the court must consider the factors set forth in MCL 722.23:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and

permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(*i*) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.[5]

[5] Additionally, the court "[t]he court *may* consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

"This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Rains v Rains*, 301 Mich App 313, 329; 836 NW2d 709 (2013).

In its discussion of the best-interest factors, the trial court gave plaintiff the advantage for factors (a), (b), (c), (d), (f), (g), (h), (*i*), (k), and (*l*). The court found the parties equal with regard to factors (e) and (j). Defendant challenges the trial court's findings on each of the factors, except (*l*).

A. MCL 722.23(A)

The testimony revealed that both parties loved their children, but that defendant had been more actively involved in their lives before the parties separated. Multiple witnesses testified that the relationship between defendant and the children appeared to be close and normal, but the testimony also showed that the relationship deteriorated. Plaintiff testified that the children were afraid of defendant and wanted no contact with her. A domestic violence advocate testified that the children were "extremely upset" that defendant attempted to attend the younger child's eighth grade graduation. The reunification counselor testified that when presented with the possibility of parenting time with their mother the children started "twitching" in their seats and looked "absolutely horrified." The trial court indicated that the child responded similarly when it asked her about parenting time with defendant, and described the child as "adamant" in not wanting to see her. Additionally, defendant acknowledged that relations with the children had deteriorated, having testified that she had "no idea" how the relationship had come to be as it currently was.

Defendant's protestation of unconditional and unwavering love, affection, and other emotional ties to the children is simply not supported by the record. Although her love for the children can hardly be doubted, the relationship was severely strained to the point where even the thought of contact with defendant caused the children grave discomfort.[6] Accordingly, the trial

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> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (*i*) Any other relevant factors. [MCL 722.27a(6) (emphasis added).]

[6] Defendant also argues that this factor should not favor plaintiff because he regularly put his needs ahead of the family and was not very supportive. However, defendant has offered no

court's finding that plaintiff had the advantage for this factor was not against the great weight of the evidence.

MCL 722.23(B)

The testimony showed that defendant was extensively involved in the children's academic and extracurricular activities before her relationship with them deteriorated and the parties separated. Defendant did try to stay involved after the parties separated, by attending the eighth grade graduation and a football game, and also in trying to see the younger child off when she went to Chicago. However, the record also clearly reveals that such efforts were distressing to the children. The police asked defendant to leave both the graduation and the football game because she was in violation of a PPO, the children were extremely upset by her presence at the graduation, and the younger child appeared frightened when defendant arrived to see her off to Chicago.

The record further indicates that defendant's mental health was a significant factor in the case, and that her condition appeared to have worsened considerably in the past few years. The court found that defendant's mental health issues left her unable to provide guidance to the children. The court's finding that plaintiff had the advantage for this factor was not against the great weight of the evidence.

MCL 722.23(C)

The trial court found that both parties were both capable and disposed to provide their children with the essentials of life, but nevertheless concluded that this factor strongly favored plaintiff. The court attached significance to the letter from the hospital describing the problems defendant caused with its continued attention to the younger daughter. In light of that evidence, we conclude that the trial court's factual findings in regard to this factor were not against the great weight of the evidence.

MCL 722.23(D)

The trial court found that the children had lived solely with plaintiff for two years and that, during that time, they were doing well, their grades had improved, and their medical conditions were under control. These findings mirrored testimony that plaintiff provided. Given our duty to defer to the factfinder in this situation, *Rains*, 301 Mich App at 329, we conclude that the trial court's findings on this factor were not against the great weight of the evidence.

MCL 722.23(E)

The trial court gave neither party the advantage for this factor. Defendant argues that this factor favored her, on the grounds that she tried to maintain the family unit during and after the

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record citation to support that assertion, and we have found no such testimony in the lower court record.

marriage whereas plaintiff and his father made disparaging remarks about, and physically assaulted, defendant in front of the children.

The record does support defendant's assertion that she tried to maintain the family unit after the parties separated, her having continued to attend events, inquire about the children's schooling, and monitor their medical appointments. But there was no evidence that plaintiff physically assaulted defendant beyond her own testimony that he had done so in 2000 and again in 2011. Again, this Court defers to the trial court's credibility determinations. *Rains*, 301 Mich App at 329. The trial court was free to discount defendant's unsupported assertions in this regard, and thus to conclude that neither party had an advantage under this factor.

MCL 722.23(F)

Defendant argues that this factor favored her because she was the primary caretaker for the children with little or no support from plaintiff. However, defendant's role as the children's primary caretaker before the separation has little if any bearing on her moral fitness as a parent. The trial court found that this factor slightly favored plaintiff in light of evidence of defendant's verbal abuse of the children. Plaintiff testified that defendant would degrade the children when disciplining them, including by resort to belittling comments, and would call one of the children "dumb" or "stupid" if she had trouble with her homework. For these reasons, the trial court's finding with regard to this factor was not against the great weight of the evidence.

MCL 722.23(G)

Defendant asserts that this factor favored her because plaintiff suffered from extreme mental health issues, and because her psychiatrist opined that defendant showed no signs of psychosis or thought disorder and required no medication. With regard to plaintiff's mental health, plaintiff admitted that he had anxiety issues around 2000, and defendant spoke of plaintiff's mental health issues throughout her testimony. However, although the parties were ordered to obtain a full psychological evaluations, nothing was submitted on the record indicating whether the doctor involved had an opinion regarding plaintiff's mental health. Further, the reunification counselor testified that she met with plaintiff, and described no mental health issues on his part. The trial court did not issue a specific finding on whether plaintiff had extreme mental health issues, but the court was not required to "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued." *Bowers v Bowers*, 198 Mich App 320, 328; 497 NW2d 602 (1993). Accordingly, we decline to determine on appeal that plaintiff had extreme mental health issues and hold such a condition against plaintiff, nor do we fault the trial court for not explicitly rejecting defendant's characterization of defendant in that regard.

Moreover, the trial court was at liberty to give greater weight to the conclusions of the doctor responsible for psychological evaluations that defendant had worsening mental health issues than to defendant's psychiatrist's t testimony to the contrary, especially because the latter saw defendant for only two brief periods. Further, the court credited the reunification counselor's testimony that defendant would treat therapy merely as an opportunity to "platform her beliefs about herself" rather than as an opportunity for defendant make any changes, because

defendant did not believe she had any reason to change. The counselor further testified that, although she was unsure if defendant needed psychotropic medication, she believed that defendant's lack of insight was causing some of the problems. Accordingly, the trial court's findings on this factor were not against the great weight of the evidence.

MCL 722.23(H)

Defendant argues that the record showed that she was the only parent involved in the children's academic and extracurricular activities while plaintiff refused to help. However, the trial court found that, while defendant certainly was the primary caretaker and overseer of extracurricular activities when the children were younger, as defendant's mental condition worsened, plaintiff began to assume the role of primary caretaker and protector. The court focused on the younger daughter's eighth grade graduation, noting that the police had to ask defendant to leave, and concluded that defendant's lack of awareness of the situation demonstrated that she could not separate her needs from those of her children. Again, the testimony clearly showed that defendant's arrival at the graduation ceremony was upsetting to the children. Further, plaintiff testified that the children's school record had improved after defendant was no longer involved. For these reasons, the trial court's findings on this factor were not against the great weight of the evidence.

MCL 722.23(*I*)

Defendant suggests that this factor be discounted on the ground that the younger child's preference on the day of her interview with the court was likely more favorable to plaintiff than what it would be after more time in his custody. The trial court did not err, however, in declining to join in such speculation. The trial court interviewed the child, and found that she was "adamant" about not wanting to see defendant, and in fact reacted to talk of time with defendant as she did when the reunification counselor broached that subject and the children responded with "twitching" in their seats and appearing "horrified" at the idea. The trial court had a basis for finding the younger child's expressed preference reasonable. Accordingly, the trial court's findings on this factor were not against the great weight of the evidence.

MCL 722.23(J)

The trial court found that this factor favored neither party, but defendant asserts that she should have the advantage, on the grounds that plaintiff has made disparaging remarks about her and otherwise mistreated her in front of the children, and also that plaintiff failed to communicate with her regarding the health of one of the children. In contrast, she asserts that she wants the children to have a loving relationship with both parents. The trial court noted that communication between the parties was limited because of the PPO and the suspension of defendant's parenting time. The court did hold against plaintiff his failure to communicate with defendant about the younger child's medical conditions, but also stated its belief that plaintiff would communicate with defendant if he believed the communication would be constructive, without drama, and without difficulty for the children. We conclude that, although the evidence could be interpreted to give defendant a slight advantage for this factor, it nonetheless does not clearly preponderate against the trial court's finding that neither party had the advantage.

MCL 722.23(K)

Defendant asserts that this factor favored her because plaintiff, under the stress of mental illness, assaulted her in 2000 and in 2011. However, the trial court found that defendant had engaged in domestic violence against plaintiff, and noted that the plaintiff and the children had resorted to a safe house proved by Siren when they left the marital home. Further, the record shows that defendant was placed on the Central Child Abuse registry, and that CPS substantiated two complaints of abuse/neglect against her. Plaintiff testified that defendant had physically abused the children as well as himself. And, again, defendant's allegations of assaults by plaintiff in 2000 and 2011 were unsupported. Accordingly, the trial court's findings on this factor were not against the great weight of the evidence.

For these reasons, plaintiff has failed to show that the trial court erred in its application of the statutory best-interest factors.

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck